108-336

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 240.

THE UNITED STATES, PLAINTIFF,

vs.

THOMAS AMBROSE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

**FILED JULY 12, 1880.**

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court rooms in the city of Cincinnati on the first Tuesday of April, being the sixth day of that month, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States of America the one hundred and fourth—present, the honorable Philip B. Swing, district judge—among the proceedings had were the following, to wit:

THE UNITED STATES
*vs.*
THOMAS AMBROSE. } 1472. Indictment for perjury.

Be it remembered that hereafter, to wit, on the sixteenth day of April, in the year last aforesaid, came the grand jurors of the United States, duly empaneled, sworn, and charged to inquire within and for the said district, and presented to the court here their certain true bill of indictment against the said defendant, Thomas Ambrose, clothed in the words and figures following, to wit:

2 No. .

THE UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

In the circuit court of the United States, within and for the southern district of Ohio, in the sixth judicial circuit, of the term of April, in the year of our Lord one thousand eight hundred and eighty.

FIRST COUNT, 3392.—The grand jurors of the United States of America, duly empaneled, sworn, and charged to inquire within and for the said district, upon their oaths and affirmations present that Thomas Ambrose, on, to wit, the eleventh day of March, in the year of our Lord one thousand eight hundred and seventy-nine, in the county of Hamilton, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being the clerk of the circuit and district courts of the United States for the southern district of Ohio, did then and there appear
3 in his own proper person before Philip B. Swing, the judge of the district court of the United States for the southern district of Ohio, and did take an oath before said judge that a certain written declaration by him subscribed was true, which said declaration was in the tenor and effect following, to wit:

"Thomas Ambrose, being duly sworn, says that the services charged in the foregoing account have been actually and necessarily performed as therein stated, and was attached to an account made by him against the Government of the United States for services performed by him as clerk of said courts during the last half of the year eighteen hundred and seventy-eight, which said account included charges for recording the proceedings of the circuit court of the United States, in certain cases theretofore pending therein, wherein the United States was a party, to wit, the sum of forty-eight dollars and thirty cents for recording three hundred and twenty-two folios in the following cases:

"Number 749. The United States vs. James L. Canterbury.
"Number 997. The United States vs. C. H. Tucker et al.
"Number 1039. The United States vs. John Conway.
"Number 1044. The United States vs. John Gaylord.
"Number 1117. The United States vs. Wm. Beckley et al.
4 "Number 1133. The United States vs. Charles Ashly.
"Number 1163. The United States vs. Jesse W. Peterson.
"Number 1189. The United States vs. Valentine Heyl.
"Number 1190. The United States vs. Casimir Lohrer,"

When in truth and fact no more than one hundred and eighty folios had been actually recorded by him in said cases, and no more than twenty-seven dollars was due to him for such services therein, as the *the* said Thomas Ambrose then and there well knew.

And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, present that he the said Thomas Ambrose, having taken the said oath before the said officer who was competent to administer the same, that said written declaration by him so subscribed as aforesaid was true, wilfully and contrary to said oath did then and there unlawfully subscribe said matters heretofore set forth, which were material and which he did not believe to be true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT, 5392.—And the grand jurors aforesaid, upon
5 their oaths and affirmations aforesaid, do further present that Thomas Ambrose, on, to wit, the nineteenth day of March, in the year of our Lord one thousand eight hundred and seventy-nine, in the county of Hamilton, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being the clerk of the circuit and district courts of the United States for the southern district of Ohio, did then and there make a written return to the Attorney-General of the United States, in the form prescribed by him, for the half year ending on the first day of January thereto preceding, of all the fees and emoluments of his said office of every name and character, and of all the necessary expenses of his office for such last half year, and did then and there appear in his own proper person before Philip B. Swing, the judge of the district court of the United States for the southern district of Ohio, and did take and subscribe an oath before said judge, who had competent authority to administer the same, of the tenor and effect following, to wit:

6 "I, Thomas Ambrose, clerk of the courts of the United States for the southern district of Ohio, do solemnly swear that the foregoing account is in all respects just and true, according to my best knowledge and belief, and that I have neither received, directly or indirectly, nor directly or indirectly agreed to receive or be paid for my own or another's benefit, any other money, article, or consideration than therein stated, nor am I entitled to any emoluments for the period therein mentioned other than those therein specified, and that I have taken all reasonable pains to collect from individuals amounts due to the United States for services in my office. So help me God."

Which said written return so sworn to by the said Thomas Ambrose aforesaid contained, among other things, the following account of his

fees and emoluments as clerk of said courts during the said half year, to wit:

7 "First. District court.

| | | | | | |
|---|---|---|---|---|---|
| "Fees and emoluments earned from the United States received.. | | | | | |
| Do. | do. | do. | do. | not received.. | 249 55 |
| "Fees and emoluments earned from individuals received..... | | | | | 264 20 |
| Do. | do. | do. | do. | not received.. | 79 90 |
| Do. | do. | do. | do. | in cases in bankruptcy received.. | 2,511 90 |
| Do. | do. | do. | do. | not received.. | |

"Second. Circuit court.

| | | | | | |
|---|---|---|---|---|---|
| "Fees and emoluments earned from the United States received.. | | | | | |
| Do. | do. | do. | do. | not received.. | 1,113 25 |
| "Fees and emoluments earned from individuals received..... | | | | | 891 75 |
| Do. | do. | do. | do. | not received.. | 364 90 |

"Total gross emoluments earned .....$5,475 45"

When in truth and in fact the said account was not in all respects just and true according to his best knowledge and belief, and in truth and in fact he had received directly and indirectly other money than therein stated, to wit, more than two hundred and sixty-four dollars and twenty cents as fees and emoluments earned from individuals in the district court, more than twenty-five hundred and eleven dollars and ninety cents as fees and emoluments earned from individuals in cases in bankruptcy in

8 the district court, and more than eight hundred and ninety-one dollars and seventy-five cents as fees and emoluments earned from individuals in the circuit court, and in truth and in fact he was entitled to emoluments for the period therein mentioned other than that therein specified, to wit, more than seventy-nine dollars and ninety cents as fees and emoluments earned from individuals in the district court, a large amount earned from individuals in cases in bankruptcy in the district court, and more than three hundred and sixty-four dollars and ninety cents as fees and emoluments earned from individuals in the circuit court, and in truth and in fact the total gross emoluments earned by him during the said period were more than five thousand four hundred and seventy-five dollars and forty-five cents, all of which he, the said Thomas Ambrose, then and there well knew.

And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, present that the said Thomas Ambrose having taken the said oath before said officer, who was competent to administer the same, that

9 said written declaration by him so subscribed as aforesaid was true, willfully and contrary to said oath did then and there unlawfully subscribe said matters hereinbefore set forth, which were material, and which he did not believe to be true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT, 5392.—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Thomas Ambrose, on, to wit, the nineteenth day of August, in the year of our Lord one thousand

eight hundred and seventy-eight, in the county of Hamilton, in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being the clerk of the circuit and district courts of the United for the southern district of Ohio, did then and there make a written return to the Attorney-General of the United States, in the form prescribed by him, for the half year ending on the first day of July
10 thereto preceding, of all the fees and emoluments of his said office of every name and character, and of all the necessary expenses of his office for such last half year, and did then and there appear in his own proper person before Philip B. Swing, the judge of the district court of the United States for the southern district of Ohio, and did take and subscribe an oath before said judge, who had competent authority to administer the same, of the tenor and effect following, to wit:

"I, Thomas Ambrose, clerk of the courts of the United States for the southern district of Ohio, do solemaly swear that the foregoing account is in all respects just and true according to my best knowledge and belief, and that I have neither received, directly or indirectly, nor directly or indirectly agreed to receive or be paid for my own or another's benefit, any other money, article, or consideration than therein stated, nor am I entitled to any emoluments for the period therein mentioned other than those therein specified, and that I have taken all reasonable pains to col-
11 lect from individuals amounts due to the United States for services in my office. So help me God." Which said written return, so sworn to be the said Thomas Ambrose as aforesaid, contained the following account of his fees and emoluments as clerk of said courts during the said half year, to wit:

"First. District court.

| | | |
|---|---|---|
| "Fees and emoluments earned from the United States received.. | 645 | 00 |
| Do. do. do. do. do. not received.. | 250 | 70 |
| "Fees and emoluments earned from individuals received..... | 242 | 40 |
| Do. do. do. do. not received... | 137 | 30 |
| Do. do. do. do. in cases of bankruptcy received.. | 1,313 | 60 |
| Do. do. do. do. do. not received.. | | |

"Second. Circuit court.

| | | |
|---|---|---|
| "Fees and emoluments earned from the United States received.. | 2,416 | 70 |
| Do. do. do. do. not received.. | 229 | 85 |
| "Fees and emoluments earned from individuals received..... | 544 | 40 |
| Do. do. do. do. not received.. | 225 | 05 |
| Total gross emoluments earned..... | $6,004 | 00" |

When in truth and in fact the said account was not in all respects just and true according to his best knowledge and belief, and in truth and in fact he had received directly and indirectly other money than as therein
12 stated, to wit, more than two hundred and forty-two dollars and forty cents as fees and emoluments earned from individuals in the district court, more than thirteen hundred and thirteen dollars and sixty cents as fees and emoluments earned from individuals in cases in bankruptcy, and more than five hundred and forty-four dollars and forty cents as fees

and emoluments earned from individuals in the circuit court, and in truth and in fact he was entitled to emoluments for the period therein mentioned other than those therein specified, to wit, more than one hundred and thirty-seven dollars and thirty cents as fees and emoluments earned from individuals in the district court, a large amount earned from individuals as fees and emoluments in cases in bankruptcy in the district court, and more than two hundred and twenty-five dollars and five cents as fees and emoluments earned from individuals in the circuit court, and in truth and in fact the total gross emoluments earned by him during the said period were more than six thousand and four dollars, all of which he, the
13 said Thomas Ambrose, then and there well knew. And so the grand jurors aforesaid, on their oaths and affirmations aforesaid, present that the said Thomas Ambrose having taken the said oath before said officer, who was competent to administer the same, that said written declaration by him so subscribed as aforesaid was true, willfully and contrary to said oath did then and there unlawfully subscribe said matters hereinbefore set forth, which were material, and which he did not believe to be true, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United State' of America.

FOURTH COUNT, 5392.—And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that Thomas Ambrose on, to wit, the eleventh day of March, in the year of our Lord one thousand eight hundred and seventy-nine, in the county of Hamilton,
14 in the State of Ohio, in the circuit and district aforesaid, and within the jurisdiction of this court, being the clerk of the circuit and district courts of the United States for the southern district of Ohio, and having made in writing an account against the government of the United States for services performed by him as clerk of said courts during the last half of the year eighteen hundred and seventy-eight, did then and there appear in his own proper person before Philip B. Swing, the judge of the district court of the United States for the southern district of Ohio, and take and subscribe an oath before said judge, who had competent authority to administer the same, of the tenor and effect following, to wit: "Thomas Ambrose, being duly sworn, says that the services charged in the foregoing account have been actually and necessarily performed as therein stated," which said account, with the aforesaid oath attached thereto, was thereupon presented to the circuit court of the United States for the southern district of Ohio, and said account was, by said oath thereto at-
15 tached, proved to the satisfaction of the court, and the said court thereupon caused to be entered of record an order approving the said account, and the said account so approved was forwarded to the proper accounting officer of the Treasury, to wit, to the First Auditor of the Treasury, which said account, so sworn to by the said Thomas Ambrose as aforesaid, including services for recording the proceedings of the circuit court of the United States in certain cases theretofore pending therein wherein the United States was a party, to wit:

Number 2801. The United States vs. Peter Keller et al.
Number 1032. The United States vs. B. Schumacher.
Number 1056. The United States vs. Chas. Fleming.
Number 1068. The United States vs. Jefferson Howard.
Number 1100. The United States vs. Baumer & Krug.
Number 1196. The United States vs. Chas. W. Jones.

Number 1220. The United States vs. Henry Picket.
Number 1234. The United States vs. Henry Folker.
Number 1238. The United States vs. Madison Bever.
Number 900. The United States vs. James Hanford.
Number 1239. The United States vs. Wm. H. Conklin.
Number 1242. The United States vs. Geo. Williams.
Number 1243. The United States vs. John Montgomery.
Number 1245. The United States vs. Mann S. Turpin.
16 Number 1246. The United States vs. Benjamin Sly.
Number 1247. The United States vs. Ira A. Fuller.
Number 1248. The United States vs. John Carrol.
Number 1249. The United States vs. John Lloyd.
Number 1284. The United States vs. Robt. Higgenbottom.
Number 1293. The United States vs. Joseph Fry.
Number 1294. The United States vs. Thomas Chrystol.
Number 1280. The United States vs. Wm. M. Rider.
Number 1264. The United States vs. Lloyd Martin.
Number 1272. The United States vs. Daniel Douglas.
Number 1283. The United States vs. John Dennis.
Number 1277. The United States vs. Doctor Moore.
Number 1255. The United States vs. John McGrath.
Number 1254. The United States vs. Henry Klusman.
Number 1268. The United States vs. Peter Keller.
Number 1290. The United States vs. Samuel Sumpter.
Number 1257. The United States vs. Jerry Faulkner.
Number 1262. The United States vs. James Dunn.
Number 1261. The United States vs. Geo. Searles.
Number 1259. The United States vs. Henry Stewart. [Wm. Stoker.]
Number 1286. The United States vs. Geo. W. Brookwalter.
Number 960. The United States vs. Wm. Bryant.

When in truth and in fact the said services had not been actually performed, the proceedings of the circuit court in said cases not having
17 been recorded, as the said Thomas Ambrose then and there well knew.

And so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, present that the said Thomas Ambrose having taken the said oath before said officer, who was competent to administer the same, that said written certificate by him so subscribed as aforesaid was true, willfully and contrary to said oath did then and there unlawfully subscribe said matters hereinbefore set forth, which was material, and which he did not believe to be true, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

CHANNING RICHARDS,
*U. S. Attorney.*

18 (Which said indictment is endorsed as follows, to wit:) No. 1472. Circuit court of the United States, southern district of Ohio. The United States vs. Thomas Ambrose. Indictment for perjury.

A true bill.

A. P. RUSSELL,
*Foreman Grand Jury.*

Filed April 16th, 1880. William C. Howard, clerk. Channing Richards, U. S. d. att'y, s. d. O.

19 And afterwards, to wit, on the fifteenth day of May, in the year last aforesaid, came the said defendant, by Hoadly, Johnson & Colston, his attorneys, and filed in the clerk's office of the court aforesaid his certain demurrer to the indictment, and to each and every count thereof, clothed in the words and figures following, to wit:

THE UNITED STATES
*vs.*
THOMAS AMBROSE. } 1472. Indictment.

Now comes the defendant and demurs to the indictment found herein, and to each count thereof, because he says that the facts therein stated are insufficient in law to constitute an offense against the laws of the United States.

HOADLY, JOHNSON & COLSTON,
*Attorneys for Defendant.*

20 Circuit court of the United States, southern district of Ohio.

THE UNITED STATES
*vs.*
THOMAS AMBROSE. } 1472. Indictment.

This cause coming on to be heard before the honorable Noah H. Swayne and honorable John Baxter, judge, of said court, sitting therein upon the demurrer of defendant to the indictment, certain questions thereupon occurred on said hearing to be decided by the court, to wit:

First. Whether the instrument set forth in the first count of indictment, and alleged therein to have been subscribed and and sworn to by the defendant, was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

Second. Whether the instrument set forth in the second count of the indictment, and alleged therein to have been subscribed sworn to by the defendant, was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

Third. Whether the instrument set forth in the third count of indictment, and alleged therein to have been subscribed and sworn to by
21 the defendant was a written declaration within the meaning of section 5392 of the Revised Statutes of the United States.

Fourth. Whether the instrument set forth in the fourth count of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written certificate within the meaning of section 5392 of the Revised Statutes of the United States.

Upon which said questions the judges aforesaid were divided in opinion.

It is thereupon ordered that the said points of disagreement, stated as above under the direction of said judges be certified under the seal of the court to the Supreme Court of the United States at their next session.

22 THE UNITED STATES OF AMERICA,
*Southern district of Ohio, ss:*

I, William C. Howard, clerk of the circuit court of the United States within and for said district, do hereby certify the foregoing to be a true and correct transcript of the certificate and proceedings of said court, had in and before said court in the case therein mentioned, remaining of record and on file in said court, and I do in conformity with the requirement of the judges therein contained so certify the same to the honorable the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati, this 22d day of May, A. D. 1880, and in the one hundred and fourth year of the Independence of the United States of America.

Attest.

[SEAL.] WILLIAM C. HOWARD,
*Clerk U. S. Cir. Crt S. D. O.*

23 UNITED STATES OF AMERICA,
*Southern district of Ohio, ss:*

I, Philip B. Swing, judge of the district court of the United States for the southern district of Ohio, sitting and holding the circuit court for said district, hereby certify that William C. Howard, who signed the foregoing certificate, was, at the time of signing the same, clerk of said circuit court, duly appointed, qualified, and acting as such; that the signature thereto is in his own handwriting, and that said attestation is in due form of law.

Witness my hand at Cincinnati, this 22d day of May, A. D. 1880.

PHILIP B. SWING,
*U. S. District Judge S. D. O., sitting and holding the Circuit Court for said district.*

24 UNITED STATES OF AMERICA,
*Southern District of Ohio, ss:*

I, William C. Howard, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify that I am well acquainted with the handwriting of Philip B. Swing, whose name is subscribed to the annexed certificate, and that the signature to the same is in his proper handwriting.

And I do further certify that he was at the time of signing the same judge of the district court of the United States for the southern district of Ohio, sitting and holding the circuit court for said district.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 22d day of May, A. D. 1880, and in the one hundred and fourth year of the Independence of the United States of America.

Attest.

[SEAL.] WILLIAM C. HOWARD,
*Clerk U. S. Cir. Crt S. D. O.*

(Indorsement on cover:) No. 240. The United States, plaintiff, vs. Thomas Ambrose. Certificate of division. S. Ohio C. C. U. S. Filed 12th July, 1880.

OFFICE SUPREME COURT U.S.
FILED
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# In the Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
v.
AMBROSE.
No. 240.

## BRIEF FOR THE UNITED STATES.

This is an indictment for perjury, under section 5392 of the Revised Statutes, and comes before the court under a certificate of division.

The case is, that in 1879 Ambrose was clerk of both the circuit and the district courts of the United States for Southern Ohio. As such his fees depended upon, amongst other things, the number of folios recorded by him; and it was besides his duty to make emolument returns, &c., to the Attorney-General and the accounting officers of the Treasury, in order to show the aggregate of compensation to which he was entitled, and whether, and if so how far, his official receipts exceeded his *maximum*,—such maximum,

upon account of his double clerkship, being by the accounting officers and the Attorney-General held to be, under section 839, $7,000 per annum.

The alleged perjury consists in swearing before the judge of the district court for Southern Ohio to official returns showing that he had recorded a larger number of folios than was true; and that he had received as emoluments a smaller amount of money than was true:—consequently in both ways fraudulently increasing his personal profits from the office, &c.

The indictment contains four counts, each of which alleges the oath in question to have been taken before "*Philip B. Swing, the judge of the district court of the United States for the southern district of Ohio;*" and in each count, pursuing a provision in section 5392, the particular offense imputed to Ambrose is his having SUBSCRIBED the matter thus falsely sworn to.

Section 5392 is as follows:

**Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered that he will testify declare depose or certify truly, or that any written testimony declaration deposition or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor not more than five years; and shall moreover thereafter be incapable of giving**

testimony in any court of the United States until such time as the judgment against him is reversed.

The following sections are also given as important, or convenient, in the same connection.

SEC. 833. Every district attorney, clerk of a district court, clerk of a circuit court, and marshal shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including clerk-hire, together with the vouchers for payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act, and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them.

SEC. 839. No clerk of a district court, or clerk of a circuit court, shall be allowed by the Attorney-General, except as provided in the next section and in section eight hundred and forty-two to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or for any such circuit clerk, or exceeding that rate for any time less than a year.

SEC. 846. The accounts of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other

public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs.

SEC. 984. Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the Treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove, by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated.

The counts in question are, respectively, in substance as follows:

1. That Ambrose took an oath before Judge Swing, "that a certain written declaration by him subscribed was true," viz, "that the services charged in the foregoing account, *i. e.*, services to the United States as clerk for the last half of year 1878, have been actually and necessarily performed as therein stated" such account showing charges for recording proceedings in certain cases, in which the United States were parties, to a much larger amount than the recording actually done justified, &c.:

*And so the grand jurors, &c., present that he, the said Thomas Ambrose, having taking the said oath before the said officer, who was competent to administer the same, that said written declaration by him so subscribed was true, willfully and contrary to said oath, did then and there unlawfully subscribe said matters heretofore set forth, which were material, &c*

2. That Ambrose made a written semi-annual return of his fees, &c., to the Attorney-General, and thereupon took and subscribed an oath before Judge Swing that "the foregoing account" was just and true, whereas such account

omitted certain other specified emoluments,—repeating the *presentment* italicised above.

3. That Ambrose made another such return to the Attorney-General, and took and subscribed another such oath, the return making like omissions;—the *presentment* above italicised being again repeated.

4. Referring to other false charges for services to the United States contained in the account that is mentioned in the first count, *the fourth* adds—that such account so subscribed and sworn to was presented to the circuit court of the United States for Southern Ohio, and was by said oath thereto attached proved to the satisfaction of the court, and an order to that effect entered of record, and the account so approved forwarded to the First Auditor of the Treasury, &c., the presentment italicized above in this first count being again repeated, with the change, however, that the writing subscribed to by Ambrose is called a *certificate* instead of a *declaration*.

To this indictment the defendant demurred (folio 19), and upon the argument thereof the learned judges below differed upon the following four questions:

1, 2, and 3. Whether the instrument set forth in each of the first three counts is a "written declaration" within the meaning of section 5392; and

4. Whether the instrument set out in the fourth count is a "written certificate" within section 5392.

A preliminary question, involving the validity of this indictment and therefore the materiality of the questions, (Buzzo's case, 18 Wall., 125,) is raised here by the counsel for the prisoner as to the power of Judge Swing to administer the oath in question.

In the court below this question was raised, and it was decided in favor of the Government, Mr. Justice Swayne delivering an opinion which cites Bailey's case, 9 Peters, 238, and is reported in 2d Federal Reporter, p. 556.

It may be added that section 846 of the Revised Statutes (above) directs that such accounts as are here in question "shall be examined and certified by the district judge," &c., such examination, as appears by the context, to be conclusive except as regards the *merits*.

I submit that when a judge is required to examine into matters of fact, it is intended to clothe him with the power to examine by *judicial* methods, that is, by sworn evidence, a reasonable incident thereto being that he may himself qualify the witnesses.

In Hughes's case, 5 Allen (Mass.), 499, upon a trial for perjury, it appeared that Hughes had made a false oath before a justice of the superior court, upon an application for bail. It was objected that the justice had no authority to administer the oath. But the court said:

> Any justice of the superior court is authorized when any person is committed to jail on a criminal accusation for want of bail to inquire into the case and admit him to bail. (Gen. Stats., C. 144, § 30; C. 170, § 36.) The power to inquire of or concerning any particular subject or matter given to a judicial officer necessarily imports an authority to administer and to examine any person or persons under the oath proper and suitable for that purpose. The allegations in the indictment, therefore, show that the

defendant was legally required to take an oath, and to answer and make statements under it in a case and upon an occasion where it might lawfully be administered.

I have found no case which contradicts this rule. Hughes's case is twice cited by Bishop, in connection with the above question. (Criminal Law, sections 1020, 1026.)

The propriety of empowering judges as such to pass upon the official accounts of the clerks of their own courts, both for their own information and otherwise, is a matter which in the present case seems to be unquestioned.

It is submitted that the words "certificate" and "declaration" are not used in section 5392 in any technical sense; and therefore that the fact that various sections in the Revised Statutes speak of certain well-known pleadings, and of other statements as "declarations" does not exclude solemn official statements like those mentioned in this indictment from being *declarations* of fact. Such other sections do not form a *context* by which to limit the natural sense of the word *declaration* in section 5392.

What is referred to there is "declarations" as matter of *evidence*, and how extensive this topic is may be seen by examining *Greenleaf* and other authorities.

In Bassett *v.* Denn (2 Harr. (N. J.), 432) the official affirmation of a surveyor was *I declare and affirm*, instead of *I promise and affirm*, as directed by statute. Objection having been made thereto, the court said:

As to the variance between the official affirmation of one of the surveyors and that prescribed by law, it is quite too unimportant to form the basis of a judicial decision in a matter of so much interest to the public. The statute, it is true, uses the word promise, but according to Walker, to promise is to make a "declaration" of some benefit, or an assurance of some ill. To say, then, "I declare that I will" do so and so, means exactly the same thing and imposes precisely the same obligation as the words "I promise that I will" do so and so. Far as we have gone in requiring a strict adherence to forms prescribed or directed by statute we have not in any of the cases cited, nor in any other case recollected, gone so far as to vitiate a proceeding otherwise regular, because a word precisely of the same meaning in the connection in which it is used with that required by or mentioned in the statute, has been adopted.

As the word "declaration" is not a term of art in section 5392, its meaning is to be taken from the ordinary dictionaries of our language, and of these *Worcester* (which I find at hand) defines it as *an explicit and open statement*. In this, as one definition thereof, Bouvier and Abbott substantially agree: Tomlin and Burrill confine their explanation of it to that of the common law pleading so called.

I submit that the word *certificate* also is used only in its original sense, as a statement which makes certain some matter of public importance or public business, and at all events covers a paper given officially by the clerk of a court as to matters regularly transpiring in his office.

For the rest I submit that every oath contains, explicitly or by implication, a preliminary appeal to God that the

party speaking is about to tell the truth in what he says; that this is so even where all that is *expressly* said is that he has told the truth by a certain declaration. The taking up of the book [in the usual form] and addressing the mind to the purpose in hand is such an appeal, and constitutes the oath which is violated by the subsequent statement.

Such was the oath violated by Ambrose under section 5372:—violated by his statement, and as well by his subscription.

S. F. PHILIPS,
*Solicitor-General.*

OFFICE SUPREME COURT U. S.
FILED
MAR 15 1883
JAMES H. McKENNEY, Clerk

*Robert Clarke & Co., Printers, Cincinnati, O.* [*March, 1883.*

IN THE

# Supreme Court of the United States.

*The United States of America,*

**No. 240.** *vs.*

*Thomas Ambrose.*

RESERVED FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF OHIO, UPON CERTIFICATE OF DIVISION OF OPINION.

ARGUMENT IN BEHALF OF DEFENDANT.

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## CASE STATED.

At the April term, 1880, of the Circuit Court of the United States for the Southern District of Ohio, the defendant was indicted and held to bail, for the alleged crime of perjury. He demurred to the indictment, (Record, page 7,) on the ground that the facts stated therein are insufficient in law to constitute an offence against the laws of the United States.

This demurrer coming on to be heard before Mr. Justice Swayne, and the Circuit Judge, (Judge Baxter,) they divided in opinion upon four questions, and certified the

points of disagreement, (Record, page 7,) to this Court for its decision.

The indictment is found under section 5392 of the Revised Statutes of the United States, which is in the following words:

"SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any Court of the United States until such time as the judgment against him is reversed."

The questions upon which the judges divide may be reduced to two, namely:

*First*:—Whether the instrument set forth in the first, second and third counts of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, were written *declarations* respectively, within the meaning of section 5392.

*Second*:—Whether the instrument set forth in the *fourth* count of the indictment, and alleged therein to have been subscribed and sworn to by the defendant, was a written *certificate* within the meaning of said section.

As will presently appear, the instruments thus referred to had substantially the same legal effect and purport, although relating to different facts, the second and third oaths consisting, each, of the affidavit of the defendant as Clerk of the

Circuit Court of the United States, to an emolument return, and the first and fourth to an affidavit to an account for costs in Government cases, and they can not therefore be legally designated by different titles. If, therefore, these instruments are written *declarations*, within the meaning of section 5392, the *second* and *third* questions must be answered in the affirmative, and the *first* and *fourth* in the negative. If they are written *certificates*, then the first *three* questions must be answered in the negative, and the *fourth* in the affirmative. If they are neither declarations nor certificates, within the meaning of section 5392, as we shall argue, then all the questions must be answered in the negative.

The section under which the clerk's emolument return is made is numbered 833 and is as follows:

"SEC. 833. Every district attorney, clerk of a District Court, clerk of a Circuit Court, and marshal shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the attorney-general, in such form as he may prescribe, a written return for the half year ending on said days respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act, and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them."

The accounts counted upon in the *first* and *fourth* counts were made under sections 846 and 984:

"SEC. 846. The accounts of district attorneys, clerks, marshals, and commissioners of Circuit Courts shall be examined and certified by the district judge of the district

for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts. Provided, that no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs."

"SEC. 984. Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated."

## ARGUMENT.

Our contention is that the emolument returns, and the accounts are what they purport to be. That they are neither declarations, nor certificates, but emolument returns, and accounts.

### I.

To constitute a declaration or certificate, under the statute, the paper must be verified before a competent tribunal, officer or person. Our first proposition is that the law of the United States did not vest in the district judge, as such, before whom these instruments were sworn, the authority to administer an oath, and therefore that these were unsworn papers, and could not constitute in law a declaration or certificate such as the statute contemplates.

The indictment charges that the affidavit was administered by the judge, not by the Court. There is no inherent authority in judges to administer oaths. No statute of the

United States confers this authority generally on any judge of the United States. Section 725 contains the following language:

"The said *courts* shall have power to impose and administer all necessary oaths."

But the oath here was not administered by the Court. The indictment does not so charge. It was administered by the judge out of Court.

It is unnecessary for us to argue that the judge is not the Court. He is an officer of the Court, and the authority given to the Court to administer the oath undoubtedly makes him one of the proper officers to administer the oath, but only when acting as a Court, or in his judicial capacity. On any other theory those statutes of the United States which confer authority to administer oaths upon judges as such, are unnecessary, as for instance section 752. Section 751 confers the power to issue writs of *habeas corpus* upon the courts of the United States. Section 752 on the justices and judges.

Section 1878 authorizes governors and secretaries of territories to take the oath of office before the district judge of the territory, or before the Chief Justice, or some associate justice of this Court. This would seem unnecessary, if section 725, by authorizing the courts of the United States to administer oaths, had given a general power to that effect to the judges of the courts.

Section 2787 requires the entry of goods subject to duty to be verified by oath of an agent,

"to be taken and subscribed before any judge of the United States."

Section 5017 provides that

"the schedule and inventory in bankruptcy must be verified by the oath of the petitioner, which may be taken either

before the district judge, or before the registrar, or before a commissioner of the Circuit Court."

By way of further illustration, another class of statutory provisions may be referred to. Thus, under section 2165, an alien's declaration of intention to become a citizen must be made,

"on oath before a Circuit or District Court of the United States, of a District or Supreme Court of the territories, or a Court of record of any of the States having common-law jurisdiction and a seal and a clerk."

Can it be claimed that this declaration may be made before a judge of the District Court of the United States out of Court, and when not acting as a Court or sitting judicially?

## II.

Our next proposition is that the instruments in question, in their essential character, are neither declarations nor certificates.

The principle, governing questions of construction of this character, is the ordinary and familiar proposition that penal laws are to be construed strictly, to which this Court gave its unqualified assent in *United States* v. *Wiltberger*, 5 Wheaton, 85, and *United States* v. *Reese*, 92 U. S. 219.

The instruments in question can not be both declarations and certificates. In form, they are neither declarations nor certificates. Neither the word "declare" nor "certify" was used. Those described in the second and third counts are affidavits to emolument returns. The others are the proofs, by affidavit, of accounts.

Upon what principle the District Attorney has labelled either the emolument return, or the affidavit to the account described in the *first* count, a declaration, and the account for

costs, described in the *fourth* count, a certificate, we are at a loss to see. He might, with equal, if not with greater, propriety, have reversed these titles. In a proper legal sense, neither of them declares or certifies. In a remote and unusual sense, each declares and also certifies.

Still more absurd is it to call the account or the affidavit, described in the *first* count, a declaration, and in the *fourth*, a certificate. These are both accounts, under sections 846 and 984, and, except amounts and dates, exactly alike.

Section 5392 is limited to two classes of oaths, of which one speaks in the future,

"that he will testify, declare, depose or certify truly."

Thomas Ambrose never swore that he would declare or certify truly.

The other form is in the past,

"that any written testimony, declaration, deposition or certificate, by him subscribed, is true."

These descriptions of the two classes of oaths differ only in the element of time, one speaking in the future, the other in the past. The oath, that the affiant will declare or certify, is, *mutatis mutandis*, equivalent to the oath that the declaration or certificate by him subscribed is true. And the latter phrase is not correctly applied to an oath, which, if it were spoken in the future, would not be, in the words of the statute,

"that he will declare or certify freely."

It is true that this objection is founded on the form of the statute, but this form was adopted by the revisers and by Congress purposely to signify precisely what it says.

We have the right to infer this from the fact that these phrases appear first in the revision, and were original with

the revisers. Their meaning and purpose must therefore have been studied.

In this case the affidavits described in the *first* and *fourth* counts are alike.

Take number one as a specimen.

"Thomas Ambrose, being duly sworn, says that the services charged in the foregoing account have been actually and necessarily performed as therein stated."

The affidavits described in the *second* and *third* counts are also alike, as follows:

"I, Thomas Ambrose, clerk of the Courts of the United States for the Southern District of Ohio, do solemnly swear that the foregoing account is in all respects just and true, according to my best knowledge and belief, and that I have neither received directly nor indirectly, nor directly or indirectly agreed to receive or be paid for my own or another's benefit, any other money, articles, or consideration than therein stated, nor am I entitled to any emoluments for the period therein mentioned other than those specified, and that I have taken all reasonable pains to collect from individuals amounts due to the United States for services in my office. So help me God."

Oddly enough the district attorney, in each of the *second* and *third* counts, has twice called the instrument in question by its proper title, "a written return." But section 5392 does not prescribe punishment for falsely swearing to a written return, and in order to bring the *second* and *third* counts within the statute, the district attorney therefore labels the instruments, "written declarations." The *fourth* count is upon an account for costs, which the district attorney first calls, properly enough,

"an account against the government of the United States,"

and adds, that, after it had been sworn to by the defendant, in these words:

"Thomas Ambrose being duly sworn says that the services charged in the foregoing account have been actually and necessarily performed as therein stated,"

it was

"presented with the foregoing oath attached thereto to the Circuit Court of the United States for the Southern District of Ohio, and said account was proved to the satisfaction of the Court, and the Court thereupon caused to be entered of record an order approving the said account."

But the district attorney is afterwards compelled to label the account thus "proved," "written *certificate*," in order to bring it within the section.

This statement might possibly justify the district attorney in claiming that the oath to the account referred to in the *fourth* count of the indictment is in the nature of "written testimony," which it seems to us, if it is within the statute at all, it much more nearly resembles than a certificate.

The *first* and *fourth* counts are founded upon like subjects. The difference is this—that, while both describe affidavits to accounts for costs, under sections 846 and 984, the *first* count calls the affidavit itself a declaration, and complains that the account contains an overcharge, or, in other words, is excessive, whereas, in the *fourth* count, either the oath alone or the oath and account together, it is not quite clear to us which, is called a certificate, and the complaint is that the work charged for in the account was not done at all.

It seems to us very clear that the oaths of the clerks of the United Sates Courts to their emolument returns or their accounts, can not be treated either as declarations or certificates, or affidavits to declarations or certificates, for

the reason that the statutes of the United States define specifically what instruments are in the nature of declarations and certificates. They authorize declarations and certificates, *iisdem nominibus*, in many cases, and require them to be verified by oath.

Thus, *first*, with regard to *declarations:*

Section 2165 requires an alien desiring to be admitted to become a citizen of the United States to declare on oath his intention.

Section 2167 permits certain aliens, who immigrated while minors, to be admitted citizens,

"without having made the declaration required"

in section 2165,

"but such alien shall make the declaration required therein at the time of his admission, and shall further declare on oath, and prove to the satisfaction of the Court, that for two years next preceding, it has been *bona fide* his intention to become a citizen of the United States."

Here is a case both of declaration and testimony. The alien declares on oath, and proves, namely, by testimony given by other witnesses, to the satisfaction of the Court, that for two years it has been *bona fide* his intention to become a citizen.

Section 2259 gives to every person who has filed a "declaration of intention" to become a citizen, the right to enter his residence, not exceeding one hundred and sixty acres of land, with the Register of the Land Office.

Section 2261 denies to a party who has filed such declaration of intention in order to claim the benefit of section 2259, the right to file at any future time a second declaration for another tract.

Section 2262 provides for an oath to the declaration of intention required under section 2259.

Sections 2264, 2266, and 2267 also describe the settler's statement and declaratory statement.

Section 2788 provides that an importer who is unaware of the particulars of his merchandise, shall declare

"upon oath all that he knows and believes concerning the quality or particulars of the merchandise and that he has no knowledge or information concerning the same."

Section 2854 provides that all invoices of imported merchandise

"shall, at or before the shipment of the merchandise, be produced to the consul, vice consul, or commercial agent of the United States nearest the place of shipment, and shall have indorsed thereon, for the use of the United States, when so produced, a declaration signed by the purchaser, manufacturer, owner or agent, setting forth that the invoice is in all respects true."

Section 2860 requires the invoice to be verified at the time of making entry, by the oath of the owner, or his authorized agent,

"certifying that the invoice and the declaration thereon are in all respects true, and were made by the person by whom the same purport to have been made."

Section 4142 provides that, in order to procure the register of a vessel, the owner shall take and subscribe an oath, "declaring according to the best of the knowledge and belief of the person so swearing the name of such vessel."

Section 4714 provides as follows:

"Declarations of pension claimants shall be made before a court of record, or before some officer thereof having custody of its seal, said officer hereby being fully authorized and empowered to administer and certify any oath or affirmation relating to any pension or application therefor; provided that the Commissioner of Pensions may designate, in localites more than twenty-five miles distant from any place at which such Court is holden, persons duly qualified

to administer oaths, before whom declarations may be made and testimony taken, and may accept declarations of claimants residing in foreign countries, made before a United States minister or consul, or before some officer of the country duly authorized to administer oaths for general purposes, and whose official character and signature shall be duly authenticated by the certificate of a United States minister or consul; declarations in claims of Indians made before a United States Agent; and declarations in claims under the provisions of this Title relating to pensions for services in the war of eighteen hundred and twelve, made before an officer duly authorized to administer oaths for general purposes, when the applicants, by reason of infirmity of age, are unable to travel; provided, that any declaration made before an officer duly authorized to administer oaths for general purposes shall be accepted to exempt a claim from the limitation as to date of filing prescribed in section 4709."

Section 4938, although held to be unconstitutional by this Court in *United States* v. *Steffens* (100 U. S. 82), nevertheless has force as indicating legislative purpose. It provides that a trade-mark certificate must, in order to create a right,

"be accompanied by a written declaration, verified by the person or some member of the firm or officer of the corporation by whom it is filed."

*Secondly*:—The Revised Statutes also contain repeated instances of *certificates* required to be under oath. Thus section 2693 provides that

"no account for the compensation for services of any clerk or other person employed in any duties in relation to the collection of the revenues shall be allowed, until such clerk or other person shall have certified under oath that the same services have been performed."

Section 2843 provides that no merchandise subject to *ad-valorem* duty belonging to a non-resident of the United States, shall be admitted to entry,

"unless the invoice is verified by the oath of the owner or one of the owners, certifying that the merchandise was actually purchased for his account."

Section 3045 provides that,

"in addition to such certificate, it shall be necessary to produce a certificate under the hand and seal of the consul or agent of the United States residing at the place, declaring either that the facts stated in the certificate of such consignee, or other person, are to his knowledge true, or that such certificate is deserving of full faith and credit, which certificates of the consignee or other person and consul or agent shall, in all cases, as respects the landing or delivery of the merchandise, be confirmed by the oath of the master and mate, if living, or, in case of their deaths, by the oath of the two principal surviving officers of the vessel in which the exportation shall be made. Where there is no consul or agent of the United States residing at the place of delivery, the certificate of the consignee, or other persons hereinbefore required, shall be confirmed by the certificate of two reputable American merchants, residing at the place, or if there are no such American merchants, then by the certificates of two reputable foreign merchants, testifying that the several facts stated in such consignee or other person's certificate, are, to their knowledge, just and true, or that such certificate is, in their opinion, worthy of full faith and credit; and such certificate shall also be supported by the oath of the master and mate or other principal officers of the vessel, in manner as before prescribed. The oath of the master and mate, or other principal officers, shall, in all cases, when taken at a foreign port, be taken and subscribed before the consul or agent of the United States residing at such foreign port, if any such consul or agent reside thereat."

Section 4421 provides that when the inspection of a steam vessel is complete, and the vessel approved by the inspectors, they shall make and subscribe a certificate to the collector, and that

"such certificate shall be verified by the oaths of the subscribers signing it before the chief officer of the customs of the district, or any other person competent by law to administer oaths."

Section 5140 provides that the payment of each installment of the capital stock of any national bank

"shall be certified to the comptroller, under oath, by the president or cashier of the association."

In further support of our contention, we add that section 5392 was not intended to create or define the offence of perjury in every case of false swearing, where an oath is required or permitted under the laws of the United States. This is manifest from section 2924, which is as follows:

"Any person who shall willfully and corruptly swear falsely on an examination before any appraiser or collector and naval officer, shall be deemed guilty of perjury, and if he is the owner, importer or consignee, the merchandise shall be forfeited."

Also, from section 5395, as follows:

"In all cases where any oath or affidavit is made or taken under and by virtue of any law relating to the naturalization of aliens, or in any proceedings under such laws, any person taking or making such oath or affidavit who knowingly swears falsely, shall be punished by imprisonment not more than five years nor less than one year, and by a fine of not more than one thousand dollars."

Respectfully submitted,

HOADLY, JOHNSON & COLSTON,

*Attorneys for Thomas Ambrose.*

CINCINNATI, *March* 3, 1883.